



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

COUNTY COURT NAME: MOMBASA ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCC/E105/2022

PHILEMONA GETRUDE BANDARI VS MWARABU CHIGIRI MUYE AND MATILDA POLA MBONJE
AND 3 OTHERS

RULING

Defendants' Application

The applicants have come to court vide a notice of motion dated 16th October 2025 seeking orders that consequent upon prayer (2) above, this Honourable Court be pleased to award the 1st, 2nd and 4th Defendants/Applicants the costs of the suit. That the Bill of Costs dated 25th November 2024 be deemed properly on record and proceed to taxation and lastly that the costs of this Application be provided for. The application is based on grounds the Plaintiff filed and served a Notice of Withdrawal of the entire suit on 22nd October 2024. That when the matter came up for pre-trial conference on 11th November 2024, counsel for the Applicants did not attend as the suit had been withdrawn.

The applicant laments that on the same date, counsel for the Plaintiff misrepresented to the Court that "the parties had negotiated and settled the matter, leading to an order marking the suit as withdrawn "with no orders as to costs. The said representation was false as there was no settlement or consent regarding costs, and the Applicants never waived their entitlement to costs. The order was made in the absence of the Applicants resulting in prejudice as it deprived them of their statutory right to costs following the Notice of Withdrawal.

The Applicants have been subjected to protracted and unnecessary litigation spanning over two years, attending numerous mentions, rulings, and applications before the withdrawal.

The applicants contend that the Plaintiff's misrepresentation led to an order that is unjust and contrary to the principle that costs follow the event and that it is in the interest of justice, fairness and equity that the impugned portion of the order be set aside or varied to restore the Applicants' right to costs. That this application has been brought without delay and in good faith.

The application is opposed on grounds there are no errors in making the order for costs since it is discretionally which discretion was properly exercised. The court does not have jurisdiction to review discretionally orders made on merit. The dispute between the parties over the suit property was been overtaken by event as the property had already been passed to a third party rendering the



suit moot. The suit was between a divorced wife and a deceased husband and therefore the order that each party bears its own cost was justified.

The applicant filed a supporting affidavit stating that that on 22nd October 2024, the plaintiff filed and served a notice of withdrawal withdrawing the entire suit against all the defendants.

The matter came up before Hon. Justice S.M.Kibunja on 11th November 2024 for a pre-trial conference, but neither the applicants nor their advocates on record attended, as the suit had been withdrawn. The court record of that date indicates that Mr. Paul Magolo, counsel for the plaintiff, informed the court that the parties have negotiated and settled the matter", upon which the Court marked the suit as withdrawn with no orders as to costs.

There was no negotiation, settlement, or consent between the parties regarding costs or any other issue. The statement by counsel for the Plaintiff was therefore false and misleading. The order was made in their absence and without their consent, thereby depriving them of their right to costs. which had already accrued virtue of the withdrawal

The Applicants contend that they had incurred substantial legal expenses over a period of more than two years, as the case was repeatedly mentioned, argued and ruled upon before withdrawal.

The Applicants filed a Bill of Costs dated 25th November 2024 which cannot be taxed in light of the impugned order.

In response to the said Bill of Costs, the Plaintiff filed a Notice of Preliminary Objection dated 29th April 2025, objecting to its taxation on the grounds that the same is futile and amounts to an abuse of the Court process in light of the orders of 11th November 2024.

The said objection underscores the continuing prejudice occasioned to the Applicants by the erroneous order of 11th November 2024 which has effectively barred them from pursuing costs duly accrued upon withdrawal. That applicant believes that it is unjust and inequitable to allow the plaintiff to withdraw the suit after dragging the Defendants through prolonged litigation and yet escape liability for costs. The said order was founded on a misrepresentation and should be set aside or varied to reinstate the Applicants' rightful entitlement to costs. That unless this Honourable Court intervenes, the Applicants will suffer serious prejudice and injustice.

The applicants submit that on 22nd October 2024, the Plaintiff filed a Notice of Withdrawal, effectively discontinuing the entire suit against all Defendants. On 11th November 2024, when the matter came up for pre-trial conference, neither the Applicants nor their legal representatives attended, as they understood that the suit had been withdrawn vide a Notice of Withdrawal of Suit dated 18th October 2024. The action of filing a Notice of Withdrawal of Suit automatically introduced the element that costs follow the event. However, during the court session on 11th November 2024, the Plaintiff's counsel misrepresented to the Court that the parties had negotiated and settled the matter, leading to an order being made to mark the suit as withdrawn with "no orders as to costs". Such an order waiving costs could only have been made in the presence of the parties waiving costs. The Notice of Withdrawal of Suit is not a consent.

The Applicants assert that the statement made by the Plaintiff's counsel was misleading, as no such settlement had taken place. Furthermore, the Applicants were not given the opportunity to be heard on the issue of costs, which, under normal circumstances, should follow the event. This error resulted in an unjust decision, depriving the Applicants of their statutory right to costs.

The applicant refers to Section 27(1) of the Civil Procedure Act provides that the costs of suits shall be at the discretion of the Court, but that costs follow the event unless there is good reason for the Court to rule otherwise. The exercise of discretion in awarding costs is mandatory, and the Court must exercise this discretion judiciously.

The applicant refers to *Mudhihiri Mohammed & 2 others v Ahmed Imani and Others* [2009] KEI-IC 1780 (KLR), the Court emphasized that costs follow the event, subject to the Court's discretion,



which must be exercised judiciously and for good reason. The Court further held that the principle that costs follow the event is not automatic and is dependent on the circumstances of each case. The principle of costs following the event is reaffirmed in *Wanjiku & 8 Others v Del Monte Kenya Ltd & Another* [2024] KEELC 13818 (KLR), where the Court stated that, while the award of costs is discretionary, a court cannot deprive a party of its costs unless it is shown that they acted unreasonably. The Court further emphasized that, when a Plaintiff withdraws a suit, the award of costs remains at the Court's discretion, which must be exercised based on the circumstances of the case, including the outcome of the proceedings. Therefore, unless the party seeking costs has acted unreasonably, the Court is generally obligated to award them. In the instant case, the Respondent's reasonably believed that the suit had been withdrawn by notice and all the Court would do is endorse the notice with costs following the event in the usual way unless expressly waived by the respondents. The Plaintiff's stole a match on the Respondents by misrepresenting that there was an agreement on costs, yet the proceedings were taken ex parte after the suit stood withdrawn. The Court was functus officio at this point, unless the Respondents expressly waived the costs.

In the present case, the applicants were compelled to defend a suit that was ultimately withdrawn without their knowledge Or consent, entitling them to the costs incurred in defending it, Furthermore, the Applicants were not heard on costs, and the order denying them costs was made based on a misrepresentation by the Plaintiff's counsel, who falsely stated that the parties had reached a settlement. This misrepresentation constitutes an error on the face of the record. Order 45 Rule 1 of the Civil Procedure Rules allows the Court to review its orders where there is an error on the face of the record. The misrepresentation of facts regarding settlement is an error apparent on the record and is a legitimate ground for reviewing the no-costs order, as the Applicants were deprived of their right to be heard.

Article 50 of the Constitution guarantees the right to a fair hearing, which includes being heard on issues that significantly affects one's rights, such as the awarding of costs. The failure to hear the Applicants on the issue of costs, especially given the misrepresentation made by the Plaintiff, constitutes a violation of this right.

On whether the Applicants are entitled to their costs of defending the suit, counsel for the applicants contends that the issue of costs is a matter of discretion and that no errors were made in the Court's ruling. Acknowledge that the award of costs is indeed within the Court's discretion, he submits that the Plaintiffs misrepresentation to the Court is a critical issue. The Plaintiff's counsel falsely claimed that the matter had been settled, which deprived the applicants of their right to be heard on the issue of costs, thus undermining the fairness of the proceedings.

The applicant cites the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014], where the Court held that the exercise of discretion regarding costs depends on the conduct of the parties and the outcome of the case, as well as other factors such as the manner of termination of the proceedings. The conduct of the Plaintiff, who, through her counsel, made false claims of settlement, should be considered when exercising discretion on costs. It is unreasonable for a party to misrepresent facts to the Court and then deny the other party the opportunity to be heard. The Plaintiff's assertion that the suit is moot because the property has passed to a third party and the dispute is between a divorced wife and a deceased husband does not absolve the Plaintiff of responsibility. The parties in this suit are not husband and wife and this suit was an unnecessary claim a fact that was variously communicated to the Court. The plaintiff even refused to attend the mediation that was attended by the Respondent at their expense. They hired counsel and it is unfair to expect them to absorb those legal costs. The Court in *Wanjiku & 8 Others v Del Monte Kenya Ltd* (supra) noted that circumstances can vary, but it would be unjust to deprive a party of its costs unless it acted unreasonably.

Counsel submits that the Applicants are entitled to their costs, especially in the absence of any bad



faith or unreasonable conduct on their part. The Court's duty to ensure fairness mandates that the Applicants be awarded costs for the unnecessary litigation they were forced to engage in. Counsel refers to Halsbury's Laws of England 4th Edition (2010) Vol. 10 para 16, which states that a Court must exercise its discretion judicially, not arbitrarily, when it comes to awarding of costs. The Applicants should not be deprived of their costs, as they were forced to defend a suit that was ultimately withdrawn through misleading representations.

Plaintiffs/Respondents Case

The plaintiff submits that the application is an attempt to review discretionary orders of the court granted on 11/11/2024 requiring each party to bear its own cost. A discretionary order by the court on costs is a final order on merit and can only be challenged on appeal in any event there are no good ground for review. In the proceedings of 11 / 11/2024 Mr. Paul Magolo, Advocate then, only indicated that the parties had negotiated the matter and that it was settled. The Advocate for the Plaintiff did not comment on costs. The Applicant did not give any valid reason in failing to attend court on 11/11/2024. The order that the matter be marked as withdrawn with no orders as costs was made by the court on merit and own its motion. This is demonstrated by the plain reading of the proceedings of 11/11/2024.

The dispute herein as pleaded in the Plaint dated 5/10/2022 had been negotiated and fully settled in another previously instituted suit involving the same subject matter and between same parties and or parties litigating under the title Winding Up Cause No, 5 of 2026 in the matter of Ziani Holdings Limited through consent dated 29/3/2023 and adopted by the court on 18/4/2023.

The plaintiff submits that a discretionary order by the court on costs is a final order on merit and can only be challenged on appeal.

In the case of National Bank of Kenya Ltd -vs- Ndungu Njau (1997) eKLR, the Court ofAppea1 held the matters in dispute had been canvassed before the learned judge. He made a conscious decision on matters in controversy and exercised his discretion in favor of the respondent. If he had reached a wrong conclusion of law, it could be a good ground on appeal but not for review. Otherwise the Court agreed that the learned judge would be sitting in appeal in his own judgment which is not permissible in law. An issue which had been hotly contested as ill this case cannot be reviewed by the same court which adjudicated upon it.

In any case there is no error or any new evidence to warrant review of the orders issued on 11/11/2024. That the bill of costs dated 25/ 11/2024 cannot be deemed as properly filed having been filed when the order denying both parties costs existed.

Analysis and Determination

The facts of this case are that the Plaintiff filed and served a Notice of Withdrawal of the entire suit on 22nd October 2024 and when the matter came up for pre-trial conference on 11th November 2024, counsel for the Applicants did not attend as the suit had been withdrawn. The applicant contends that on the same date, counsel for the Plaintiff misrepresented to the Court that "the parties had negotiated and settled the matter, leading to an order marking the suit as withdrawn "with no orders as to costs. The said representation was false as there was no settlement or consent regarding costs, and the Applicants never waived their entitlement to costs. The order was made in the absence of the Applicants resulting in prejudice as it deprived them of their statutory right to costs following the Notice of Withdrawal. Order 25 of the Civil Procedure Rules of Kenya governs the withdrawal and adjustment of suits. It allows a plaintiff to withdraw or discontinue a suit against all or any defendants via written notice before the hearing is set, without this constituting a defense to a subsequent action. Order 25 Rule 1 provides that a plaintiff may discontinue or withdraw any part of a claim before the suit is set for hearing by serving a written notice to all parties. Rule 2 Provides procedures for when a suit is discontinued. Rule 5 provides that if a suit is adjusted in whole or in part by a lawful agreement or compromise, the court can record this and enter judgment



accordingly. Costs may be awarded upon withdrawal or settlement.

In this case, the court ordered the matter withdrawn with no order as to costs after hearing Mr Magolo for the plaintiff and without hearing counsel for the defendants. It is not clear whether the counsel for the defendants was aware of the mention scheduled on 14th of November 2024.

I do find that there was error apparent on record when the court found that the defendants were aware of the mention date when indeed the defendants were not present when the date was taken on the 9th of October 2024. The Judge ordered that the mention notice to be issued but it is not clear whether the notices were served. The plaintiff counsel appears to have stolen a match by informing the court that the matter had been settled without such evidence of a settlement.

The Defendants have cited Section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules 2010. Section 80 of the Civil Procedure Act states as follows;

“80. Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 of the Civil Procedure Rules 2010 also states thus;-

“45. 1(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order may apply for a review of judgment to the court which pass the decree or made the order without unreasonable delay”

The above provisions circumscribe the jurisdiction of the Court in an application for review. In this case, I do find mistake and or error apparent on the face of record namely the statement by counsel for the plaintiff that the matter had been settled that was mistakenly accepted by the court and therefore denying the defendants costs.

The conditions in Order 45 of the Civil Procedure Rules 2010 have to be satisfied although within a much wider approach expressed in constitutional desire in Article 159 of the Constitution and the overriding objective in sections 1A and 1B Civil Procedure Act to serve substantive justice.

The standard was stated in *Kithoi v Kioko* (1982) KLR 177, page 181, by the Court of Appeal that;

“.....the Civil Procedure Rules Order XLIV demands inter alia, that an application for review must

be based in the discovery of new and important evidence which was not within the applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake on the face of the record or for any other sufficient reason.

The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, falling which the application will not be granted.” (Emphasis added)

In the upshot, this court is pleased to award the 1st, 2nd and 4th Defendants/Applicants the costs of the suit. The Bill of Costs dated 25th Day of November 2024 is deemed properly on record and to proceed to taxation and lastly that the costs of this Application are awarded to the defendants.

RULING READ, DATED AND DELIVERED AT MOMBASA VIRTUALLY THIS 2ND DAY OF MARCH 2026.



SIGNED BY/FOR:
HON. JUSTICE ANTONY O. OMBWAYO



THE JUDICIARY OF KENYA. MOMBASA
ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT
DATE: 2026-03-03 17:01:20

